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North Valley Justice Court  
14264 West Tierra Buena Lane  
Surprise, AZ 85301

## **IN THE SUPREME COURT OF THE STATE OF ARIZONA**

In the Matter of:	)	Supreme Court
	)	No. R-16-0040
PETITION TO AMEND	)	
RULES 5(a), 5(b)(6), 5(b)(7) and	)	Objection to Proposed Rule
Add Rules 13(h) and 20 of the	)	Changes, to Proposed Mandatory
RULES OF PROCEDURE FOR	)	Summons and Complaint, to
EVICITION ACTIONS	)	Proposed Mandatory Notice
	)	Forms, and Suggested
	)	Alternative Language for Forms

### **BACKGROUND**

The author of this pleading is a justice of the peace in Maricopa County. He has served on three rule writing committees, the State Bar's Civil Jury Instruction Committee, and knows the level of effort and compromise that goes into producing the type of work product that has been completed; but he has significant and serious concerns about what has been proposed in the petition, especially the proposed mandatory eviction forms. They were not recently circulated among the justices of the peace and he did not see the proposed forms in final form until the week before this petition was filed. Concerns with the proposed forms were muted somewhat based on a belief that they were going to be optional rather than mandatory.

Some of the numerous problems with the forms will be detailed in this pleading. At a minimum, please do not force justice courts to use a two page judgment form, with check off boxes for items that appear in perhaps one out of every five-hundred cases (e.g. counterclaims, non-waiver agreements). In addition, the notice forms should be in the form of a cure notice from a landlord to a tenant. Instead, the proposed forms contain both cure notice language and also third person language, almost as if it was coming from a court order. The proposed notice forms are significantly more wordy than the forms currently on the Maricopa County Justice Courts' web page and the proposed notice forms are also truly confusing. In contrast, some of the proposals in the petition, especially a requirement that the complaint identify whether the case involves government subsidized housing, are genuinely good ideas.

## **I.**

### **MANDATING SPECIFIC FORMS FOR NOTICES, BUT ESPECIALLY FOR COMPLAINTS, IS UNNECESSARILY RESTRICTIVE AND WILL GENERATE TENUOUS PROCEDURAL DUE PROCESS ARGUMENTS**

While a mandatory form for a summons is often appropriate,<sup>1</sup> requiring landlord attorneys to file their complaints only on a court approved

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<sup>1</sup> JCRCP 112(b); JCRCP, Appendix I.

form is unnecessarily restrictive and arguably insulting. There is certainly no proposal that attorneys representing tenants be restricted either to a court approved answer form or to a court approved counterclaim form. If the complaint complies with the numerous requirements of the applicable statutes and rules,<sup>2</sup> then it should be legally sufficient.

It is also somewhat ridiculous to require landlords and attorneys representing landlords to use a complaint form containing language for causes of action that they are not even alleging, only to leave those portions of the complaint form blank. Even so, a larger problem concerns potential remedies if a landlord used a notice form that contains substantially similar but not identical language.

If the required forms, especially in their current form, are made mandatory, then it will provide a basis for tenants to claim that their case should be dismissed simply because the form used in their case does not exactly match the form required by the Administrative Office of the Courts. Doing so is contrary to modern notice pleading requirements and to generally established principles of law. Procedural due process requires simply that a party have a meaningful opportunity to be heard, at a

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<sup>2</sup> RPEA 5(b), 5(c) & 5(d).

meaningful time in the process, and in a meaningful manner.<sup>3</sup> If the proposed mandatory notice forms are adopted without any opportunity for flexibility, then it would be possible for a tenant to argue that their case should be dismissed even though the landlord complied with the requirements of the statutes, any case law, and the Rules of Procedure for Eviction Actions (RPEA), and even though the tenant clearly understood what he or she needed to do to cure the alleged breach of the lease.<sup>4</sup>

American courts once followed a code pleading format that drew distinctions between merely alleging that someone is “entitled to possession of specific property” (which was inadequate) and alleging that someone is the owner and is entitled to possession (which was sufficient).<sup>5</sup> We do not need to return to a system that values format over substance, especially since it is already clear that only a proper plaintiff can prevail in an eviction action<sup>6</sup> and since it is already clear that only the property owner or his or her attorney can appear in court on behalf of the plaintiff.<sup>7</sup> In short, proposed

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<sup>3</sup> *Comeau v. Ariz. St. Bd. of Dental Examiners*, 196 Ariz. 102, 107-108, 993 P.2d 1066, 1071-1072 (Ct. App. 1999)(Investigative interview was adequate).

<sup>4</sup> Judges may hear similar arguments to the following: “But your honor, clearly the notice was defective because it only advised my client once that he should get any settlement agreement with his landlord in writing and the rules now require that a notice form be used that tells him that twice.”

<sup>5</sup> Clark, *The Complaint in Code Pleading*, 35 Yale L.J. 259, 262 (1926).

<sup>6</sup> RPEA 5(b)(1).

<sup>7</sup> RPEA 11(a)(1).

Rule 20 should be modified to read simply, “When applicable,<sup>8</sup> landlords should use forms that are substantially similar to the notice forms in the appendix to these rules.”

### III.

#### **PROPOSED LANGUAGE IN THE NOTICE FORMS MISLEADS TENANTS AS TO WHAT WILL HAPPEN IN COURT AND AS TO WHETHER THEY CAN REQUEST A COURT ORDER FOR MORE TIME TO CURE ANY ALLEGED BREACH OF THE LEASE**

The proposed forms share some of the same common problems. For example, nearly every proposed form instructs the tenant to get any settlement in writing, not just once, but twice. This unnecessary duplication adds little, if any, value. However, there is a problem that goes well beyond elements of style.

Nearly every proposed form contains this problematic sentence: “After a hearing, the judge will decide if you have to move or can remain in the rental.” There are two major errors in that sentence.

*Hearing* is a term of art that involves some type of litigated procedure where a judicial officer makes either a factual or legal determination (or both) after hearing evidence (usually in the form of witness testimony). In

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<sup>8</sup> The “when applicable” language is designed to avoid a need to create an additional set of official forms for the Arizona Mobile Home Parks Residential Landlord and Tenant Act. A.R.S. §§ 33-1401 - 33-1501. It also avoids needing to create either a set of forms or additional language for month-to-month leases concerning a landlord’s duty to mitigate damages.

contrast, eviction actions are summary proceedings. If the tenant cannot articulate a legal defense to the landlord's allegations, then a judgment will be entered in favor of the landlord.<sup>9</sup> If the tenant is able to do so, then the case is immediately set for a trial, but no hearing will occur.<sup>10</sup> In addition to misrepresenting the law, the proposed sentence inaccurately describes the judge's role.

If a tenant is in a courtroom because of an eviction action, the judge will not "decide if [the tenant has] to move or can remain in the" residence. In reality, the judge will decide whether the landlord has met his or her burden of proof.

At least weekly if not daily, tenants appear in justice courts in Maricopa County for eviction actions with a false hope that the judge will give them additional time to pay their rent based on a sudden financial hardship. There is no legal authority to do so; but the proposed language at least infers that there is and sets judges up to fail. Tenants who appear with that false hope will leave thinking that the judge, and perhaps the judicial branch as a whole, did not care about them. A judge politely explaining that

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<sup>9</sup> RPEA 11(b)(1).

<sup>10</sup> The only time a hearing is held in connection with eviction actions is if there is an issue concerning the writ of restitution. RPEA 14(b)(2). The North Valley Justice Court has set perhaps two since the rules were adopted in 2009.

the law is different than what is suggested on the mandatory form will appear nonsensical. Any explanation at that point will also be largely irrelevant to the emotions tenants feel as they leave the courtroom.

#### IV.

#### **THE PROPOSED FIVE-DAY NOTICE FOR NONPAYMENT OF RENT IS IN A CONFUSING FORMAT AND CONTAINS CONFUSING LANGUAGE**

Prior to filing an eviction action for nonpayment of rent, the landlord must give the tenant a five-day cure notice. This notice must: (1) state the amount of any unpaid rent and any other amount due; (2) notify the tenant of the landlord's intent to terminate the lease if the amount due is not received within five days after the notice is given to the tenant, and (3) inform the tenant that if the amount due is not paid, that the tenant must then surrender possession of the residence.<sup>11</sup> On day six, the landlord can file suit.

The five day notice for nonpayment of rent and the ten day non-compliance notice are by far the most frequent types of notice forms used in residential landlord tenant actions. Suggested alternative forms for both of these documents are attached to this pleading.

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<sup>11</sup> A.R.S. § 33-1368(B). The sufficiency of the notice is a question of law. If the allegation alleges non-payment of rent for a space in a mobile home park, then the landlord must give the tenant a seven-day notice. *See generally*, Williams, *Representing Residential Tenants in Eviction Actions*, 28 Ariz. Attorney 12 (Nov. 2011).

There are numerous problems with the proposed five day notice. The entire format of the document invites the reader to set it aside and to read it later. It contains random parenthetical commentary (e.g. “Must be listed in rental agreement” or “if allowed in rental agreement”). There is also no information presented stating that the security deposit cannot be used to pay the rent, which is one of the more common misunderstandings frequently expressed by tenants. In addition, the proposed form refers the tenant to five sources of reference material, none of which is the RPEA.

### **CONCLUSION**

Access to justice issues for tenants often have little to do with tenants not understanding why they are facing eviction. Instead, they are more likely to concern either repair and maintenance issues or how to get their security deposit back. (Sample letters and forms for those issues are also on our justice court web page.)<sup>12</sup> For example, they know that they have not paid their rent, but incorrectly believe that they can “rent strike” by withholding rent until their landlord makes the repair.

As a matter of public policy, it is a mistake to use a set of mandatory forms to change the law in an effort to make it more difficult for landlords to

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<sup>12</sup> In addition, our bench Best Practices Committee recently requested input on draft sample complaint forms that can be given to tenants who wish to file a cause of action against their landlord under A.R.S. § 33-1367, either for an unlawful ouster or for a failure to supply essential services.



evict tenants. It also harms the target population because if you make it more difficult to evict tenants who are not complying with the terms of their lease, then landlords will be forced to raise the rent on the tenants who are. Phoenix and Tucson currently have reasonably affordable housing when compared to similar cities around the United States.<sup>13</sup> Perhaps one of the reasons for that is that Arizona has a set of statutes and rules governing residential landlord and tenant matters that provide clear and quick remedies for an obvious breach of a lease. If that system is going to be significantly changed, then those changes should come either in the form of statutory changes or in the form of deliberate substantive changes to the RPEA. The RPEA uses clear and simple language that is understandable to a self represented litigant and its' provisions are unambiguous. There is no need for some type of implied repeal of them or implied amendment to them.

While the objectives behind the proposed forms are noble, the actual language of the forms must be, and can easily be, improved.

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<sup>13</sup> One survey of apartment rent found rent in Phoenix to be less expensive than several major cities (e.g. Austin, Baltimore, Charlotte, Dallas, Denver, Indianapolis, Nashville, Portland, Seattle) and found rent in Tucson to be equally less expensive than other arguably comparable locations (e.g. Albuquerque, Columbus, El Paso, Las Vegas, Louisville, Memphis, Milwaukee, San Antonio). DePietro, *Here's What the Typical One-Bedroom Apartment Costs in 50 U.S. Cities*, Business Insider (Jun. 17, 2016).

I respectfully request that this Court either reject this petition or remand it to a committee where all stakeholders have equal representation and where consensus language will be achieved.

RESPECTFULLY SUBMITTED, this 5th day of August 2016.

/s/ Gerald A. Williams  
GERALD A. WILLIAMS  
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North Valley Justice Court  
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Copy Mailed To:  
Hon. Lawrence Winthrop  
Arizona Court of Appeals  
1501 West Washington, Suite 401  
Phoenix, AZ 85007

**NOTICE OF INTENT TO END LEASE  
FOR FAILURE TO PAY RENT  
(Five Day Notice)**

[Date]

To: [Tenant's Name and Address]  
And Any and All Occupants

You have not paid your rent on time. You owe the following amount:

This Month's Rent: \_\_\_\_\_  
Late Fees: \_\_\_\_\_  
Additional Amount: \_\_\_\_\_

Total as of the date of this notice: \$ \_\_\_\_\_

The additional amount is for \_\_\_\_\_. The late fees are increasing at a rate of \$\_\_\_\_\_ per day.

**Your landlord is seriously considering filing an eviction action against you but would like to give you a chance to solve this problem without the need for anyone to go to court.** Please contact us immediately. You will need to make arrangements to pay the money you owe. If you cannot do so, then we demand that you move out, and that you return the keys to the residence, five calendar days from the day you received this notice.

After you move out (either now or at the end of your lease), your landlord may apply some or all of your security deposit toward any unpaid rent, but your security deposit will not be used to pay your rent now.

Even if you move out, you are still responsible for all of the rent that is due until the property can be rented again to a new tenant. You may also be required to refund any discount you received (called a rental concession) and may be required to pay other charges stated in the lease.

If your landlord files an eviction action in court against you, then you may also be required to pay court costs and attorney's fees. If your landlord files an eviction case against you, as part of that case, you will receive a handout that explains your rights and obligations.

*[Landlord or Property Manager's Name]  
[Address and Telephone Number]*

**Additional Information:** The law for these kind of cases can be found in Arizona Revised Statutes sections 33-1368(B) and 12-1171 and in the in the Arizona Rules of Procedure for Eviction Actions. Additional help may be available at [insert local or state bar web pages or lawyer referral services].

This notice was served by: <input type="checkbox"/> Hand delivery to by giving it to (name): _____ who is a <input type="checkbox"/> tenant <input type="checkbox"/> occupant <input type="checkbox"/> By certified mail
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**NOTICE OF INTENT TO END LEASE  
(Ten Day Notice)**

[Date]

To: [Tenant's Name and Address]  
And Any and All Occupants

You are not following the terms in your lease. If you do not fix the following problems within ten days, then your lease will end. The problems are [unauthorized pet, unauthorized occupant, too much clutter on balcony]\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

**Your landlord is seriously considering filing an eviction action against you but would like to give you a chance to solve this problem without the need for anyone to go to court.** Please contact us immediately.

If this problem, or something similar, happens again, then you will receive a second notice and, at that point, your landlord can legally file an eviction action against you.

If your landlord files an eviction action in court against you, then you may also be required to pay court costs and attorney's fees. If your landlord files an eviction case against you, as part of that case, you will receive a handout that explains your rights and obligations.

[Landlord or Property Manager's Name]  
[Address and Telephone Number]

**Additional Information:** The law for these kind of cases can be found in Arizona Revised Statutes sections 33-1368(A) and 12-1171 and in the in the Arizona Rules of Procedure for Eviction Actions. Additional help may be available at [insert local or state bar web pages or lawyer referral services].

<p>This notice was served by: <input type="checkbox"/> Hand delivery to by giving it to (name): _____ who is a <input type="checkbox"/> tenant <input type="checkbox"/> occupant <input type="checkbox"/> By certified mail</p>
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